IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 159 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

RAHIMBHAI MOHMADBHAI SHAIKH

Appearance:
1. Criminal Appeal No. 159 of 1991
Mr B D Desai, APP for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 02/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an appeal under Section 378 of the Code of Criminal Procedure, 1973 (for short, "the Code")

challenging the judgment and acquittal order dated 07/12/90 under which the learned Additional Sessions Judge, Mehsana, in Sessions Case No. 64 of 1990, acquitted the respondent from the offence punishable under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 as well as from the offence punishable under Section 66(1)(b) of the Bombay Prohibitions Act, 1949.

2. The case of the prosecution before the trial court may be briefly stated as follows:

Police Sub-Inpsector, Mr.Gondalia, had received an information that a person was to carry Charas with him on a road between Kasba and Azad Chowk. Therefore, the said PSI conveyed the said fact to the PSO and went to the spot with two panchas and other police personnel. They waited for the present respondent to pass through the said road.

3. At about 11.15 AM on 07/01/90, the respondent was found passing from the said road. He was required to hold on the spot. At that time, according to the case of the prosecution, the respondent tried to run away. Therefore, he was apprehended and according to the case of the prosecution, an inquiry was made from him, as to whether he wanted to be searched in presence of a police gazetted officer. The respondent declined and therefore, he was searched by Mr.Gondalia, in presence of panchas. From his personal search, a small polythene bag containing Seven pieces of Charas was found. It was seized. It was also sealed and the sample was sent to the F.S.L.. Panchanama was drawn on the spot and the said Officer filed his FIR. Investigation was undertaken. F.S.L. report was received. The F.S.L. report mentioned that it was Charas. After concluding the investigation, chargesheet was filed. On receiving the chargesheet, copies of police investigation papers were supplied to the respondent. Charge was framed. The respondent pleaded not guilty to the said charge and therefore, evidence was recorded. At the conclusion of evidence, further statement of the respondent was recorded. Arguments were heard. At the end of the trial, the learned Judge found that the prosecution had failed to bring home charge to the respondent and therefore, the learned Judge recorded a judgment of acquittal. Hence, this acquittal appeal.

4. The prosecution had examined witnesses and an attempt was made to prove the case. In the present appeal, it has been contended that the trial court has

committed serious error in holding that the mandatory provisions of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short, "the said Act") have not been complied with. That, the trial court has also erred in holding that for noncompliance of the said provisions, the respondent was entitled to an order of acquittal. That, on the whole, the judgment and acquittal order of the trial court are illegal and erroneous and deserve to be set aside. The State, has therefore, contended that the present appeal be allowed, the judgment and acquittal order be set aside and the respondent be convicted for the offences as aforesaid.

5. On receiving the appeal, it was admitted and Notice of admission was served upon the respondent. The respondent has not thought it proper to appear and contest the appeal.

6. At the hearing, we have heard Mr.B D Desai learned APP for the State and there was none to appear on behalf of the respondent. The learned APP has taken us through the evidence on record and also through the observations of the learned trial Judge during the course of the judgment.

7. The prosecution has examined PSI, A J Gondalia, at Ex.10 who has deposed that he had received an information that a person was to pass with Charas in his possession. It is required to be considered that the entire process of search and seizure was conducted by him in presence of panchas. The muddammal was seized and sealed in their presence and the same was submitted to the Police Station, as per his evidence at Ex.10.

7.1 Now, on going through the evidence of this witness, it is pertinent to note that the witness has not stated in his evidence that the information received by him was reduced into writing. It is required to be considered that he was a police officer of the rank of PSI and not a Gazetted Police Officer.

7.2 In above view of the matter, it was necessary for him to reduce the information received by him in writing. He has nowhere stated that he has reduced the information received, in writing. It is required to be considered that he was in the Police Station when he received the information. Therefore, he had all opportunity to reduce the said information into writing. This has not been done and the concerned witness has not explained as to why the information was not reduced into writing.

7.3 He has, further stated that the said information was conveyed to the Police Station Officer. It is not on record that the Police Station Officer, at the relevant point of time, was a superior officer. That means, that the information received was not immediately conveyed to the superior police officer.

8. On this aspect, we may refer to the provision made in Subsection 2 of Section 42 of the said Act, which may be reproduced for ready reference as follows;

Subsection 2 of Section 42 : Where an officer takes down any information in writing under Subsection (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior.

9. On a bare reading of Subsection 2 of Section 42 of the said Act, it becomes clear that when an officer has taken down any information in writing under Sub section 1 or has recorded grounds of his delay under the proviso thereto, he has to forthwith send a copy thereof to his immediate official superior.

10. The evidence is lacking on this aspect of the case and it is not proved that this Officer had conveyed the information to his superior officer.

11. Then, we can also refer to the provision made in Subsection 1 of Section 42 of the said Act, which may be reproduced for ready reference as follows;

Subsection 1 of Section 42 : "Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) or the Revenue, Drugs Control, Excise, Police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an

offence under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case or resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance;

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

12. Then, we may also find out as to whether the provision contained in Section 50 of the said Act has been complied with or not. In the present case, in order to appreciate the provision contained in Section 50, it may be reproduced for ready reference as follows:

Section 50 : Conditions under which search of persons shall be conducted,-

(1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so required, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the neared Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be search by any one excepting a female.

13. The provision contained in Section 50 makes it clear that when an officer duly authorized under Section 42 is about to search any person under Section 41, 42 and 43 and if such person so requires, he has to take such a person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The said section has been interpreted consistently and the interpretation is that it is the duty of the searching officer to convey to the accused person about his right of being searched in presence of a Magistrate or a Gazetted Officer of the concerned department. In the present case, we find that the said Officer, Mr.Gondalia at Ex.10 has stated during the course of his evidence that he had given an option to the respondent, if he wanted to be searched in presence of a police Gazetted Officer. Now, this is not required under Subsection 1 of Section 50 of the said Act. An offer should have been to the effect, as to whether he wanted to be searched in presence of a Gazetted Officer of a concerned department or a Magistrate. An offer to be examined in presence of a Police Gazetted Officer is, in our opinion, not a sufficient compliance to Section 50 of the said Act.

14. It is required to be considered that there is no further evidence on record to show that any other offer was made to the respondent. For this purpose, we can refer to the FIR at Ex.11. The offer was as to whether the respondent wanted to be searched in presence of an Executive Magistrate or any other Magistrate. Now, an Executive Magistrate may not be a Gazetted Officer, in as much as, even Dy.Mamlatdars are being appointed as Executive Magistrates and they are not Gazetted Officers. Therefore, the offer shown to have been made to the respondent in the FIR is also not in sufficient compliance with Section 50 of the said Act. Moreover,

the offer made is also doubtful. The evidence is different and the FIR is also different. Therefore, it can be said that the evidence on the point of offer is not satisfactory and reliable.

15. The next witness is D N Dave, Ex.12. He is a witness from F.S.L.. Therefore, his evidence would not be relevant for the purpose of Section 50 of the said Act.

16. Panch, R B Patel, Ex.14 has been examined and there he has stated that before the search was undertaken, an inquiry was made from the respondent as to whether he wanted to be searched in presence of a Magistrate. The evidence of this witness, with respect to the said offer is in conflict with the evidence of the informant and the FIR.

17. Then, we can turn to the panchnama, Ex.15. There also it has been mentioned that the respondent was required to be searched and he was also asked as to whether he wanted to be searched, in presence of an Executive Magistrate or any other Magistrate. Here, also the particulars are lacking. Again the Executive Magistrate is not necessarily a Gazetted Officer. Again there is contradictory version and the oral evidence of panch witness is in direct conflict with the statement of fact made in the panchnama.

18. Then, we can turn to the evidence of B M Soni, Ex.17 in whose presence the weightment was taken out. He is naturally, not in a position to say about the offer which was made under Section 50 of the said Act.

19. K P Thakor, Ex.18 is a PSO who was a witness to the search and seizure and who had accompanied the informant. He has also stated about the offer and according to his evidence, the offer was as to whether the respondent wanted to be searched in presence of an Executive Magistrate or a Gazetted Officer. This evidence is again in conflict with the evidence of the panch witness and with the evidence of the informant. It is again in conflict with the evidence of the FIR and the panchnama.

20. Ushaben Pujari, Ex.20 is a witness from F.S.L. and therefore, she would not be in a position to say anything about the offer as required by Section 50 of the said Act.

21. In above view of the matter, it is clear that the

evidence with respect to the offer if self-contradictory and there is intere se conflict between the evidence of witnesses on the point of offer. Further, it is not clear as to whether a clear offer was made to the respondent, that he wanted to be searched in presence of a Magistrate or in presence of a Gazetted Officer. It is not in dispute that the provision contained in Section 50 of the said Act, with respect to the offer, is a mandatory requirement of law and it is also not much in dispute that noncompliance of Section 50 would result in the acquittal of an accused person.

22. The trial court has observed, during the course of its judgment, that the evidence on the point of offer under Section 50 is not satisfactory and the prosecution has not proved beyond reasonable doubt that the offer as required by Section 50, was made to the respondent, before his search was carried out. The trial court has accordingly acquitted the respondent on the aforesaid ground.

23. This is an acquittal appeal and even if two views are possible, it would not be possible for this Court to substitute the view of this Court, in place of the view recorded by the trial court. The approach of the trial court is not found to be illegal or unreasonable. The finding recorded by the trial court is not found to be against the evidence on record. In above view of the matter, it is not possible for us to discard the findings recorded by the trial court, which has been arrived at on due consideration and on appreciation of the evidence on record. When the finding of the trial court is not found to be against the weight of evidence on record, then in that event, the said finding arrived at by the trial court cannot be brushed aside very lightly by this court in an acquittal appeal.

24. We also find on the appreciation of evidence on record that the evidence about the offer under Section 50 of the said Act is not reliable and does not inspire confidence. Therefore, we have no option but to agree with the finding of the trial court that there is no satisfactory evidence about the compliance to Section 50 of the said Act.

25. It is well settled that when the evidence is lacking on the point of compliance with Section 50 of the said Act, the accused person will be entitled to an acquittal and he would also be entitled to a benefit of reasonable doubt. In the present case, we find that the prosecution has not proved that the provisions contained

in Section 50 of the said Act were complied with. On this aspect of the case, no authority is required. However, with a view to complete the judgment, we can refer to a decision in the State of Punjab Vs. Baldev Singh, reported in (1999) 6 SCC, 172. In Para 32 of the said judgment it has been laid down that the provision of Section 50 of the Act, implicitly makes it imperative and obligatory and castes a duty on the investigation officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspected and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article recovered during search conducted in violation of the provisions of Section 50 of the Act.

26. The above decision leaves no room for any doubt in holding that the provisions made in Section 50 of the said Act are mandatory and noncompliance of the said provisions will lead to an acquittal of the accused. As stated above, it is not clear as to what was the offer or option given to the respondent, which would clearly mandatory provisions of Section 50 of the said Act and consequently the learned trial Judge was justified in acquitting the respondent. In above view of the matter, we find no substance in the present appeal and therefore, it deserves to be dismissed.

27. For the foregoing reasons, this appeal is ordered to be dismissed and the judgment and acquittal order recorded by the trial court are hereby confirmed. The bail bonds of the respondent are cancelled and the surety stands discharged.

(D. P. Buch, J.)

(H. H. Mehta, J.)

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